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JUDICIAL CONSTITUTIONAL AMENDMENT AS ILLUSTRATED BY THE DEVOLUTION OF THE INSTITUTION OF THE JURY FROM A FUNDAMENTAL RIGHT TO A MERE METHOD OF PROCEDURE.*

INTRODUCTION.

It may be well to preface my remarks by stating what I do not intend to talk about, although should I state this in detail I fear that it would well nigh exhaust the domain of constitutional law. I would like, however, to make it clear that I have no intention whatever of treating any one topic of that great subject with fullness, nor of attempting to digest the cases relating to any particular subject.

General heads, such as "Due Process of Law," or "Taxation," have been treated fully in text books and digests of the many cases and attempts to systematize and classify them have been made.

Judge Brannon and Mr. Guthrie have written excellent works on those subjects. The Honorable Chief Judge of this State has written an exhaustive and interesting monograph on "Due Process of Law," which, as he is still on the bench, I cannot praise as it deserves lest the disinterestedness of my motives be questioned.

* This article was delivered as a lecture before the Dwight Alumni Association, March 11, 1904, being one of a series.

What then is my apology for addressing you at all? Simply this: That I hope to be able to indicate how radical changes in the organic law are constantly taking place of which even we lawyers seem almost unconscious. I may try, in an every day sort of a way, to philosophize a bit about them; probably I shall propound opinions which you will partly or wholly dissent from, thus indicating independence of judgment if nothing else. Your dissent may be some indication, however feeble, that I am wrong, but it will at least stimulate you to think hard on the topics suggested and to work out a better and more correct theory. If I seem therefore, to dogmatize it will be rather for the purpose of setting other people to thinking of some of the problems suggested than an attempt to propound anything like a scientific statement of the actual process of evolution, if I may venture to use that much abused term, which our fundamental law is undergoing.

Such a course will, I trust, possibly lead to some tangible conclusions, perhaps somewhat at variance with the orthodox view, but I wish to disclaim *in foro* any attempt at systematic treatment, and I should prefer to denominate what I shall say to you this evening as a "talk," rather than to dignify it by the more pompous title of "Lecture."

It is a trite saying that constitutional law is altogether peculiar to the American system. There is no other country that I know of in which many questions here considered constitutional and consequently falling within the domain and jurisdiction of courts are treated as other than political. This idea was happily stated by the late Lord Chief Justice of England, Charles Russell, Earl of Killowen. He had a rare faculty for going straight to the point—hitting the nail on the head in terse and exact phrases. He said in a magazine article entitled: "The Bar as a Profession," as follows:

"When great political and constitutional questions are being agitated and are unsolved, these find their way in time into the legal forum and the world then becomes the richer by the impassioned speech of an Erskine or a Brougham, a Curran or an O'Connell, a Berryer or a Gambetta."

We may interrupt this quotation to suggest that the fact that these men were great lawyers, was really incidental, for had they been only laymen they would have had the same opportunities, although perhaps not the same qualification, to discuss constitutional questions, since those questions in England and France have always been treated as purely politicial, being debated and

decided in parliamentary assemblies, necessarily governed only by their own views of right and expediency.

To continue the quotation, however:

"But in these islands few of these great questions are unsettled; and as according to the British Constitution the will of Parliament is supreme there is but little opportunity in these days for discussing the constitutional problems which necessarily recur, for example, in the United States, governed as they are by a written Constitution, where the judicial power is called upon to interpret, and if necessary to control the acts of legislatures.

"It is largely to this fact that we owe the masterly judgments of, among others, the great Chief Justice of the United States, Chief Justice Marshall, and the granite like arguments of Daniel Webster, perhaps the greatest forensic figure the world has ever seen."

In treating of constitutional law at all, therefore, we are treating of subjects which do not usually fall within any domain except that of pure politics and are in their inherent nature political.

Constitutional discussions in Great Britain, such as that concerning the regency of George IV., involving as it did the whole theory of British sovereignty, take place, of course, in Parliament and the decision one way or another by a majority vote may serve as a precedent, but is, of course, in no way binding upon a succeeding Parliament. The whole British Constitution itself is, with the exception of a few legislative documents like Magna Charta and the Bill of Rights, nothing more than a mass of custom, which is only binding because the mass of the English people have enough respect for their own history and ancient precedents to hesitate to depart therefrom, or to modify them only when they feel very certain that they have become obsolete by lapse of time and change in manners and customs. The great charters themselves operate solely on the executive, for Parliament is unfettered and sovereign, circumscribed only by public opinion.

Justice Bradley in the Slaughter House Cases says:

"The privileges and immunities of Englishmen were established and secured by long usage and by various acts of Parliament. But it may be said that the Parliament of England has unlimited authority, and might repeal the laws which have from time to time been enacted. Theoretically this is so, but practically it is not. England has no written constitution, it is true; but it has an unwritten one, resting in the acknowledged, and frequently declared, privileges of Parliament and the people, to violate which in any

material respect would produce a revolution in an hour. A violation of one of the fundamental principles of that constitution in the Colonies, namely, the principle that recognizes the property of the people as their own, and which, therefore, regards all taxes for the support of government as gifts of the people through their representatives, and regards taxation without representation as subversive of free government, was the origin of our own revolution." (16 Wall., p. 115.)

The great English historian, Mr. Lecky, in his delightful book on "Democracy and Liberty," put it in this way: (Vol. I., p. 139.):

"Many of the most important working elements in the Constitution (the nature of the Cabinet, the functions of the Prime Minister, the dignity and the attitude of the speakers, the initiative of the Government in matters of finance, the extent to which the House of Lords may use its veto) rest essentially on the foundation of custom. It is absolutely indispensable to the working of the whole machine that it should be in the hands of honest and trustworthy men, of men determined to subordinate on great occasions their personal and party interests to the interests of the State; imbued with a genuine spirit of compromise and cordially in harmony with the general spirit of the Constitution. As long as such a spirit prevails in Parliament and governs the constituencies, so long the British Constitution will prove a success. If this spirit is no longer found among rulers and Parliaments and constituencies, there is no Constitution which may be more easily dislocated and which provides less means of checking excesses of bad government."

In our great sister Republic of France, founded upon complete democracy, no such tribunal as our Supreme Court exists. While there is a written Constitution it can be changed at will by the National Assembly, that is to say both Houses sitting together, and the Courts can have no more effect upon it than they could upon any ordinary statute; nor would they for a moment attempt to question any law passed by the Chambers as being in conflict with the Constitution.

It is easy to contrast this system with our own in which the principles and general essential outlines of government are fixed in a written Constitution, which in theory cannot be changed save by amendment, and which amendment must be brought about by so very large a preponderance of votes.

At first glance our system would seem to indicate a much greater rigidity than that of the English, but on the other hand the difficulty of amending it and the historical fact that all the amendments were either virtually synchronous with the establishment of the Constitution or brought about by four years of war, indicate

how little change has really been brought about by amendment under ordinary cirsumstances in the normal constitutional method.

The danger to a governmental system based upon a written Constitution is, of course, the exact opposite of that incident to a customary system like the British. Such a written Constitution may become so rigid that the ever advancing and changing ideas of new generations, finds no vent or outlet, save by a process of amendment so difficult as to be almost prohibitive except where there is a substantial unanimity of opinion, and the Constitution is either overthrown, as we have seen not infrequently in countries to the South of us, or it becomes like the Hindoo laws, unchanged and unchangeable, regarded as sacred and an almost complete obstruction to any real advance in civilization. The British Parliament has passed laws which could certainly not be thought constitutional in the United States.

"The course which was pursued by the British Legislature towards Irish land was different, and if the terms 'honesty' and 'dishonesty' apply to the acts of Parliaments or Governments as truly as to individuals, it was distinctly and grossly dishonest. Under the Constitution of the United States, the greater part of this legislation, being a direct violation of contract, would have been beyond the competence of Congress. Nor is there, I believe, anything in the legislation of the great European countries that is parallel to it. It has been described by one of the best continental writers upon government as an attack on the principle of property more radical than any measure of the French Revolution, or even of the Reign of Terror. It is, indeed, much less like ordinary legislation than like extraordinary legislation of the nature of acts of attainder or confiscation." (Lecky, Democracy and Liberty, Vol. 1, pp. 192-193.)

That we have escaped both of these dangers is largely due to our Supreme Court. The function of that tribunal as interpreter of the Constitution has become most important, because this interpretation has kept it, as I hope to indicate, so closely in touch with modern ideas that our institutions have been gradually modified, and although they have perhaps ceased to be in accord with the ideas of the framers, they have become suited to the opinions of to-day. As Mr. Justice Holmes said, speaking of municipal law:

"A system of law at any time is the resultant of present needs and present notions of what is wise and right on the one hand and on the other of rules handed down from earliest states of

society and embodying needs and notions which more or less have passed away." (In the Youth's Companion.)

Or, as he put it in an earlier work (The Common Law, pp. 35, 36):

"The foregoing history, apart from the purposes for which it has been given, well illustrates the paradox of form and substance in the development of law. In form its growth is logical. The official theory is that each new decision follows syllogistically from existing precedents. But just as the clavicle in the cat only tells of the existence of some earlier creature to which a collar-bone was useful, precedents survive in the law long after the use they once served is at an end and the reason for them has been forgotten. The result of following them must often be failure and confusion from the merely legical point of view."

"On the other hand, in substance the growth of the law is legislative. And this in a deeper sense than that what the courts declare to have always been the law is in fact new. It is legislative in its grounds. The very consideration which judges most rarely mention, and always with an apology, are the secret root from which the law draws all the juices of life. I mean, of course, consideration of what is expedient for the community concerned. Every important principle which is developed by litigation is in fact and at bottom the result of more or less definitely understood views of public policy; most generally, to be sure, under our practice and traditions, the unconscious result of instinctive preferences and inarticulate convictions, but none the less traceable to views of public policy in the last analysis. And as the law is administered by able and experienced men, who know too much to sacrifice good sense to a syllogism, it will be found that, when ancient rules maintain themselves in the way that has been and will be shown in this book, new reasons more fitted to the time have been found for them, and that they gradually receive a new content, and at last a new form, from the grounds to which they have been transplanted.

"But hitherto this process has been largely unconscious. It is important, on that account, to bring to mind what the actual course of events has been. If it were only to insist on a more conscious recognition of the legislative function of the courts, as just explained, it would be useful, as we shall see more clearly further on.

"What has been said will explain the failure of all theories which consider the law only from its formal side, whether they attempt to deduce the *corpus* from *a priori postulates,* or fall into the humbler error of supposing the science of the law to reside in the *legeantia juris,* or logical cohesion of part with part. The truth is, that the law is always approaching, and never reaching, consistency. It is forever adopting new principles from life at one end, and it always retains old ones from history at the other,

which have not yet been absorbed or sloughed off. It will become entirely consistent only when it ceases to grow."

How much truer is this of constitutional law.

I once met an eminent judge of one of our highest courts who insisted upon speaking of constitutional law as politics. I asked him why he spoke of it in that way, and his answer was:

"The questions involved are purely political; they deal with matters about which men's opinions are formed entirely in accord with their views upon questions as to State and Government, and the relation between the Government and the individual."

As well try to treat medical questions apart from medical considerations as to treat constitutional law, necessarily involving the relations of men to government, from any other point of view than that of political science. What do we mean when we call Marshall a strong Federalist and Taney a strict Constructionist? Simply that they differed as to fundamental uqestions of Government.

One may be an excellent judge in an ordinary law court and know little about the various theories of Government or the history of this or of other countries, but no man could sit long on the bench of the Supreme Court without being called upon to decide some question in regard to which history and political science would be indispensable guides. The voluminous opinions in the recent Insular Cases deal mainly with questions of American history. A man who had no views on political questions would be unfit to sit on the Supreme Bench. I speak, of course, of politics in the broad sense regardless of the particular matters which partisan politics are constantly agitating.

As was said by Mr. Justice Harlan a short while ago at a banquet given in his honor by the members of the Bar of the Supreme Court:

"The power of the Supreme Court for good as well as for evil can scarcely be exaggerated. If it cannot actually shape the destiny of our country, it can exert a commanding influence in that direction. It can by its judgments strengthen our institutions in the confidence and affection of the people, or more easily than any other Department it can undermine the foundations of our governmental system. It can undo the work of the fathers by abrogating all canons of constitutional construction that have helped to make this the foremost Nation of the earth. *It can, to use the words of Chief Justice Marshall, explain away the Constitution of our country and leave it a magnificent structure indeed to look at, but totally unfit for use.*"

Mr. Justice Brewer upon the same occasion expressed the same thought when he said:

"This great tribunal which keeps the forces of State and Nation alike within their appointed bounds, must depend for its authority upon the respect and confidence of the people. That respect and confidence of the people must, in my judgment, depend upon the influence of the legal profession. *A court which has their support will endure; a court without that support will perish.*"

The President of the United States, Mr. Roosevelt, also said at this banquet:

"For the judges of the Supreme Court of the land must be, not only great justices, but they must be great constructive statesmen, and the truth of what I say is illustrated by every study of American statesmanship. For in not one serious study of American political life, will it be possible to omit the immense part played by the Supreme Court *in the creation, not merely the modification of the great policies through and by means of which the country has moved on to its present position.*"

All this seems perhaps somewhat at variance with the general official theory current among lawyers. We have assumed, without much reasoning on the subject, that the Court merely interpreted the Constitution and that every thing that the Court said was really in the Constitution itself.

Of course this view is most superficial and cannot stand analysis.

If it were true lawyers would have to read only the Constitution itself and would not have to examine the hundred and ninety odd volumes of reports for the purpose of finding out what our constitutional law to-day actually is.

The Constitution itself merely lays down broad general principles and it is fortunate that it does so because if it attempted to go into detail it would have the prolixity of a legal code, and at the same time it would be much more difficult to adapt it to present needs by invoking the doctrine, perhaps I should say fiction, of interpretation.

We have always had two sets of questions constantly coming up for decision before the Supreme Court. The first set involve the debatable ground between the sphere allotted to the Federal Government by the Constitution and that reserved to the States. The underlying theory of our whole structure was never settled until the civil war and the consequent amendments which declared that the Nation and not the States were sovereign. Yet while the fundamental principle is settled that sovereignty is national and not

state, there remains many mooted questions as to the powers and limitations of the States, such as those arising under the Interstate Commerce clause.

The other set of questions are those arising between the individual and the state, as Herbert Spencer puts it "The Man v. The State." They are assuming daily greater prominence because of the growing pressure of the government on the individual.

We all know that the general tendency of our time is toward the centralization of power. In the domain of public law this takes the form of increasing the powers of Government, both State and Federal, over the liberty of the individual. In private law this same tendency is marked by the great agglomerations of capital and the constantly expanding sphere of corporate action in the domain once covered by individual initiative.

It is impossible to ignore the fact that such a general tendency exists, not only in America, but throughout the world, and it necessarily affects in great measure our constitutional law; the changes in general opinion upon public questions making it nescessary, consciously or unconsciously, for the Court to fall in with the general procession of ideas. This view is aptly expressed by Mr. Justice Brown in the case of *Holden v. Hardy,* (169 U. S., 366, at pp. 385-6).

"An examination of both these classes of cases under the Fourteenth Amendment will demonstrate that, in passing upon the validity of State legislation under that amendment, this court has not failed to recognize the fact that the law is, to a certain extent, a progressive science; that in some of the States methods of procedure, *which at the time the Constitution was adopted were deemed essential to the protection and safety of the people, or to the liberty of the citizen, have been found to be no longer necessary;* that restrictions which had formerly been laid upon the conduct of individuals, or of classes of individuals, had proved detrimental to their interests; while upon the other hand, certain other classes of persons, particularly those engaged in dangerous or unhealthy employments, have been found to be in need of additional protection."

In speaking of the "science of law," the learned Justice evidently does thereby not mean the study and analysis of existing law, but intends to indicate that the making of law by Courts is itself progressive and follows the modification of public opinion.

THE JURY NO LONGER A FUNDAMENTAL INSTITUTION, BUT A MERE METHOD OF PROCEDURE.

This general tendency by which the Constitution is being constantly brought, as the French say *en rapport* with existing ideas, is no where, I believe, so well instanced as in the evolution of jury trial from a fundamental right into a mere method of procedure.

This proposition which, I believe, can be established by the examination of the cases on this subject in the Supreme Court of the United States is:

A right secured to the people by the Constitution in most positive language, treated by the framers of the Constitution, by the original State Constitutions, and by the public opinion of the time as a sacred and fundamental right, has in the course of a hundred years been relegated to the rank of a mere method of procedure, as said in *Holden v. Hardy,* just cited.

This important change has been accomplished without any formal amendment to the Constitution, but wholly under the guise of judicial interpretation. It has not been brought about on any theory that the language or intention of the framers of the Constitution was ambiguous, but because the Court considered that law being a "progressive science," the opinion of to-day, not the intention of the framers, should fashion constitutional law.

In stating this proposition and in attempting to elucidate it I do not wish to seem in any way to criticise that great tribunal. What I believe we should do is to examine quite dispassionately the process by which our constitutional law is developed and expanded, just as the chemist analyzes the properties of the substance in his crucible. He does so, or should do so if he hopes to succeed, without prejudice, passion or preconceived theory, solely with a view to ascertaining the chemical resultant of his combinations.

As Dr. Johnson says: "Let us rid ourselves of cant;" let us not do one thing and say another; let us not act upon the theory that the Constitution is as unchangeable as the law of the Medes and the Persians, when it is being constantly changed by the judicial interpretation, quite as effectually and much more easily than it could be by amendment in the prescribed form.

No where has this been more clearly stated than in the utterances of the Court itself, (*Hurtado v. California,* 110 U. S., 516, 528), in speaking of the opinion in *Murray's Lessee v. Hoboken,* Mr. Justice Matthews said:

"The point in the case cited rose in reference to a summary proceeding, questioned on that account, as not due process of law. The answer was: however exceptional it may be as tested by definitions and principles of ordinary procedure, neverthless, this, in substance, has been immemorially the actual law of the land, and, therefore, is due process of law. But to hold that such a characteristic is essential to due process of law, would be to deny every quality of the law but its age, and to render it incapable of progress or improvement. *It would be to stamp upon our jurisprudence the unchangeableness attributed to the laws of the Medes and Persians.*"

That the law must change with the development of civilization is plain; the doubt arises as to how far fundamental institutions should be modified or abrogated by the Court rather than in the constitutionally prescribed way.

That such a method of virtual amendment by judicial interpretation has been found reflects credit upon the political ability of our people. Loose thinking, however, has generally been characteristic of English and American lawyers. While they have generally possessed sound common sense and enlightened views of justice, they have proceeded without much concern about legal theory or careful analysis of what was really taking place in the domain of legal development. Hence, vast changes have been brought about in the common law while the Bar was still insisting that the law, as it was in the time of Henry II. or Edward I., had not suffered material modification.

Fiction is necessary to progress, so deep rooted is the natural aversion of man to change. Nor is its utility confined to primitive law as Sir Henry Maine seems to indicate.

"The successful achievement of innovation without revolution depends mainly upon an artifice which derives its vitality from one of the most deep-seated tendencies of the human mind and which has unquestionably been one of the chief agencies in forwarding social progress. I refer to the artifice of 'legal fiction' as shown in the pretense that the novelty of belief or practice just inaugurated has its warrant in time-honored precedent. * * * It is this which enables changes to be made 'constitutionally' or in accordance with a system of ethics framed in an age when the changes in question could not possibly have been contemplated or provided for." (Fiske, Cosmic Philosophy, Vol. II., pp. 279-80.)

The origin of the jury was long a much mooted question, but the researches of the two great historians of the English law seem to have finally laid the question at rest.

Messrs. Pollock and Maitland in their epoch making book on the history of the English law tell us that:

"The English jury has been so highly prized by Englishmen, so often copied by foreigners, that its origin has been sought in many different directions. At the present day, however, there can be little doubt as to the quarter to which we ought to look. We must look to the Frankish *inquisitio,* the prerogative right of the Frankish kings."

They then explain that the origin of the jury was not really popular but royal; that the Frankish King or Emperor in traveling about his domains, summoned together men of the various localities and questioned them as to crimes committed during the previous year. This institution was more like that of our grand jury than of our petit jury. Some sort of a slow amalgam between this and the compurgators or men who swore to the truth of the parties' oaths in a trial, seems to have led ultimately to the modern institution of the jury.

As the Frankish Empire broke up, the Norman Dukes, modeling their smaller domain upon that of the great Empire of Charlamagne, retained the *inquisitio,* but there is an intervening period during which we know little of the jury. As the same authors say, speaking of that time:

"Then deep darkness settles down. When it lifts we see in the new States that have formed themselves no central power capable of weilding the old prerogative for a long time to come; the sworn inquest of neighbors will not be an utterly unknown thing in France; it will only be finally overwhelming by the reception of the Roman canonical procedure. Even in Germany it will appear from time to time, yet on the whole we may say that but for the conquest of England it would have perished and long ago have become a matter for the antiquary."

"Such is now the prevailing opinion and it has triumphed in this country over the natural disinclination of Englishmen to admit that this palladium of our liberties is in its origin not English but Frankish, not popular but royal."

The petit jury in something like its present form, as well as the accusing or grand jury, became part of the ordinary mechanism of justice apparently about the reign of Henry II. (1154-1189) and they both appear, in something like their final form, about the middle of the twelfth century.

The jury while thus an ancient institution in Europe became peculiar to England, owing to a long train of historic causes which I do not now propose to trace. It was regarded as one of the

most important of our institutions at the time of the adoption of the Constitution and was guaranteed by the Constitution of every one of the original States. (*Hurtado v. California,* 110 U. S., p. 557.)

The views entertained of it in this country are well set out by Mr. Justice Field in a charge to a grand jury reported in 2 Sawyer, Circuit Court, 667, and quoted with approval by the great judge, Mr. Justice Miller, in the case of *Ex Parte Bain,* 121 U. S., 1:

"'The institution of the grand jury,' he says, 'is of very ancient origin in the history of England—it goes back many centuries. For a long period its powers were not clearly defined; and it would seem from the account of commentators on the laws of that country, that it was at first a body which not only accused, but which also tried, public offenders. However this may have been in its origin, it was at the time of the settlement of this country an informing and accusing tribunal only, without whose previous action no person charged with a felony could, except in certain special cases, be put upon his trial. And in the struggles which at times arose in England between the powers of a king and the rights of the subject, it often stood as a barrier against persecution in his name; until, at length, it came to be regarded as an institution by which the subject was rendered secure against oppression from unfounded prosecutions of the crown. In this country, from the popular character of our institutions, there has seldom been any contest between the government and the citizen which required the existence of the grand jury as a protection against oppressive action of the government. Yet, the institution was adopted in this country, and is continued from considerations similar to those which give to it its chief value in England, and is designed as a means, not only of bringing to trial persons accused of public offences upon just grounds, but also as a means of protecting the citizen against unfounded accusation, whether it comes from government, or be prompted by partisan passion or private enmity. No person shall be required, according to the fundamental law of the country, except in the cases mentioned, to answer for any of the higher crimes unless this body, consisting of not less than sixteen nor more than twenty-three good and lawful men, selected from the body of the district, shall declare, upon careful deliberation, under the solemnity of an oath, that there is good reason for his accusation and trial.'" (pp. 10-11.)

That the men who framed the Constitution, as well as the public opinion of the time, believed jury trial to be a fundamental right and no mere method of procedure is shown by the following extract from the great ordinance for the government of the Northwest Territory, passed by the Congress under the Confederation, and ratified

by the first Congress under the Constitution. The language used is as follows:

"*And for extending the fundamental principles* of civil and religious liberty which form the basis whereof these Republics, their law and institutions are erected; to fix and establish those principles as the basis of all laws, Constitutions and Governments which forever hereafter shall be formed in the said Territory, etc., it is hereby ordained and declared, by the authority aforesaid, that the following articles shall be considered as articles of compact between the original States and the people and States in the said Territory and forever remain unalterable, unless by common consent, to wit:

"ART. 1. No person demeaning himself in peaceable and ordinary manner, shall ever be molested on account of his mode of worship or religious sentiments in the said Territory.

"ART. 2. The inhabitants of the said Territory shall always be entitled to the benefits of the writ of *habeas corpus* and of the trial by jury."

The Constitution of the United States provides, Article III., Section 1:

"The trial of all crimes except in cases of impeachment shall be by jury."

The Fifth and Sixth Amendments to the Constitution provide:

"That no person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury."

And that in all criminal prosecutions:

"The accused shall enjoy the right to a speedy and public trial by an impartial jury of the State and District wherein the crime shall have been committed."

It has been held by a long line of authorities, both before and after the adoption of the Fourteenth Amendment, that the so-called Bill of Rights contained in the first eight amendments to the Constitution applied only to the Federal Government and did not limit the power of the States.

This was due to the fact that at the time of the adoption of the Constitution it was fear of the general government and its possible encroachments upon individual liberty that caused apprehension among the people of the States. Their desire was to establish a government which, while having stability, would not be in any position to encroach upon the liberties which the colonists had learned to believe by reason of the development of English his-

tory to be essential to their happiness and prosperity. (*Barron v. Baltimore,* 7 Pet., 243.)

The States were looked upon as the guarantors of the liberty of their own citizens and the "Bill of Rights" was not intended to run against the action of the States.

A State could even abridge the freedom of religion.

The case of *Permoli v. New Orleans,* 3 How., 589, (1845), holds squarely that the first amendment as to freedom of religion does not apply to the action of the States. Under the reasoning of the Hurtado and Maxwell cases this would be true even since the enactment of the Fourteenth Amendment.

A statute of New Orleans, passed in pursuance of authorization by the State legislature, forbade a performance of funeral rites in any save one building in New Orleans. A deceased person was brought to a Catholic Church and the ordinary funeral rites there performed. The parish priest in charge was punished for a violation of the ordinance and the case came to the Supreme Court of the United States on a writ of error on the ground that the ordinance was in violation of the First Amendment of the Constitution as well as the Act admitting Louisiana to statehood. The answer made by the Court was as follows:

"The Constitution makes no provision for protecting the citizens of the respective States in their religious liberties; this is left to the State constitutions and laws; nor is there any inhibition imposed by the Constitution of the United States in this respect on the States." (p. 609.)

This has been specifically held also in regard to the Seventh Amendment, in *Walker v. Sauvinet,* 92 U. S. 90.

Chief Justice Waite said:

"By art. 7 of the amendments, it is provided, that 'in suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved.' This, as has been many times decided, relates only to trials in the courts of the United States. *Edwards v. Elliot,* 21 Wall. 557. The States, so far as this amendment is concerned, are left to regulate trials in their own courts in their own way. A trial by jury in suits at common law pending in the State courts is not, therefore, a privilege or immunity of national citizenship, which the States are forbidden by the Fourteenth Amendment to abridge. A State cannot deprive a person of his property without due process of law; but this does not necessarily imply that all trials in the State courts affecting the property of persons must be by jury. This requirement of the Constitution is met if the trial is had according to the settled course of judicial proceedings. *Murray's Lessee v.*

Hoboken L. & I. Co., 18 How. 280. Due process of law is process due according to the law of the land. This process in the States is regulated by the law of the State." (pp. 92-93.)

It may be well to mention incidentally the fact that the Constitution of the United States and especially the Amendments spoken of contain no language indicative of or in any way borrowed from the French writers, whose theories in that time in the domain of politics were so universally dominant. Phrases such as those found in the Declaration of Independence, drawn by Mr. Jefferson himself, so susceptible to the influence of the French philosophers, are nowhere to be found in the Constitution itself. The origin of every one of the rights mentioned in the Bill of Rights can be traced to some event or series of incidents in English history, won out finally as the result of years of struggle.

The Constitution, therefore, deals with practical and tangible rights and does not indulge in any philosophic generalizations.

Take, for instance, the Amendments *seriatim.*

The first article provides that there shall be no established religion. It is because of "an establishment of religion" in England and the persecution of dissenters therefrom that the founders of Massachusetts and numerous other colonies had left the mother country. No vague theory of natural rights dominated the framers, and the fact that there were so many adherents of various denominations among the American people made it impossible that any one religion should be established and thus rendered it easy to acquiesce in a Constitution which protected all alike.

The abridging of freedom of speech or of the press, likewise referred to a long struggle with the English Crown, as did the right of the people to assemble and petition the Government for a redress of grievances which we find contained in the Petition of Rights and embodied in the Bill of Rights more than one hundred years before Rousseau.

The second article, providing for a well-regulated militia, bore witness to the constitutional dislike of English people for a standing army as a menace to their rights, a natural result of the long conflict with the Stuart Kings; and the right of the people to bear arms was a tacit tribute to the view that in case of necessity other protection than that of a Constitution might prove a necessary resort.

The prohibition in the third article against the quartering of

soldiers in any house is traceable to the practice of the Monarchy before 1688, rightly so unpopular in England. (Green, Eng. People, 501.)

The fourth article is a direct outcome of that long agitiation which culminated in the celebrated Wilkes case, in which the English Courts, sustaining Wilkes, held general warrants and seizures illegal. The doctrine of *Entick v. Carrington and Three King's Messengers,* enunciated so boldly by Lord Camden as a canon of English liberty, became imbedded in the Constitution as a protection, so the framers thought, for all future time to those under American sovereignty. (*Boyd v. United States,* 116 U. S., 616.)

The fifth and sixth articles, as well as the seventh, providing for jury trials in civil cases, were considered upon a par with the other great rights, and as those three amendments occupy almost as much space in the eight amendments constituting the so-called "Bill of Rights" as the others put together, it would seem that the framers did not consider that they occupied a comparatively subsidary position and dealt merely with matters of procedure. That the Supreme Court at this day takes a very different view we will now see.

That grand and petit juries are essential in Federal Courts in their fullest force as known to the common law, has never been questioned. *Ex parte Bain, supra.* That they are necessary in all our Territories, acquired previous to 1898, has also been judicially determined.

The eighth amendment prohibiting excessive bail, excessive fines, and cruel and unusual punishment does no more than follow the English "Bill of Rights."

The cases of *Thompson v. Utah,* 170 U. S., 343, and *American Publishing Co. v. Fisher,* 166 U. S., 464, as well as *Springville v. Thomas,* 166 U. S., 707, are authority for the proposition that a territorial legislature in Utah could not abolish jury trial, that being a right secured by the Constitution to every person against the action of the Federal Government.

These cases have been somewhat refined away in the Insular cases by the suggestion in Mr. Justice Brown's opinion, (*Downes v. Bidwell*), that the Constitution had been enacted into Utah Territory by legislation and hence was only there by force of statute, thus leaving open the question of the power of Congress under the Constitution in territory outside the States.

Hurtado v. California, 110 U. S., 516, involved the validity of a section of the Constitution of California, providing for prosecution by information in place of the common law method of indictment in cases of infamous crime. In the Supreme Court the prisoner claimed that under the Fourteenth Amendment he was entitled to due process of law, and that due process of law involved indictment by grand jury.

The Court held, (Mr. Justice Harlan dissenting) that due process of law did not necessarily involve indictment by grand jury. Mr. Justice Matthews, writing for the Court, went into the historic evidence as to the origin of juries and came to the conclusion that the phrase "Due Process of Law," or its equivalent in English institutional history, "The Law of the Land," did not include indictment in capital cases.

I cannot at the present time critically examine the question as to how far this view is historically justified. Yet, whatever may have been the fact at the time Magna Charta was wrung from King John whether in that great instrument "judgment of his peers," (*Judicium parium*) meant what jury trial now does, or whether it referred to the then Court of Exchequer, it does appear altogether clear that, at the time of the ratification of the Constitution, due process of law in capital cases necessarily involved jury trial.

By going back to the beginnings of history, a time will be reached when almost any one of our present institutions is found in the mere germ and would seem, except perhaps to the antiquary, wholly unrecognizable. Due process of law once involved maiming, torturing, the ordeal by fire and water, the *peine forte et dure* and the other processes which we now look upon as barbarous and shocking, but the question which would seem to have been presented in *Hurtado v. California,* was what the phrase, "Due Process of Law," meant at the time of the ratification of the Constitution, or perhaps what it meant at the time of the passage of the Fourteenth Amendment.

It seems to us that Justice Matthews, in going back to primitive law, is in conflict with the view propounded in *Thompson v. Utah,* 170 U. S., 343. In the latter case jury trial was deemed to have been essential from the time of Magna Charta, and while this may historically be open to question, nevertheless the decision of the Court in that case was based upon the clearly correct proposition that it was deemed fundamental *at the time of the ratification of the Constitution.*

It would seem that the decision in *Hurtado v. California* was really due to the fact that a century of legal development had changed American public opinion upon the subject of the jury.

This appears forcibly in the case of *Maxwell v. Dow,* 176 U. S., 581, a recent case of the highest importance. In that case the same question was presented as in *Hurtado v. California,* together with a further one arising from the fact that the trial had been by a jury of eight under the California constitution and law. An argument not urged or pressed by counsel in the Hurtado case was here advanced and fully considered by the Court.

Counsel for the prisoner claimed that the Fourteenth Amendment providing that no State shall abridge any of the rights, privleges or immunities of a citizen of the United States, guaranteed to every citizen jury trial. His claim was in effect that the first eight amendments to the Contstitution constituted rights of an American citizen which no State could abridge.

The Court held otherwise, holding that the eight amendments, after the ratification of the Fourteenth Amendment had no greater scope than before and that they were still solely directed against the action of the Federal Government. The Fourteenth Amendment not having made them applicable to the action of the States, while it was difficult to state just what the rights and immunities of an American citizen were, jury trial, and indictment by grand jury, were not included among them.

This was indeed a momentous decision.

The Fourteenth Amendment according to this view did not attempt to enlarge the existing rights and immunities of American citizens, but at most merely protected existing rights and immunities against the State Governments. What were these rights and how would they be determined? If they were not in the first eight amendments, where did the Constitution provide for them? These rights and immunities are not enumerated in nor conferred by any clause of the Constitution except in so far as they may be conferred in the clause providing:

"Art. 4, Sec. 2. The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States."

It was pointed out by counsel in the Maxwell case that the debates in Congress evidenced the intention of the framers of the amendment to confer upon the citizen of the States all the rights contained in the eight amendments. (Guthrie, Fourteenth Amendment, 22-4.)

Had this view been adopted it would have gone far to nationalizing the domain of civil liberty, as was the evident intent of the framers of the Amendment, but the fact that the Court took a different view would seem to have rendered that portion of the amendment virtually meaningless.

If the privileges and immunities of citizens of the United States have been in no way increased by the amendment, it is hard to see what benefit such citizens have received. The rights and privileges which they enjoyed already under the Constitution were protected as well before as after the Fourteenth Amendment; unless then they were to receive some advantage from this clause, why should it have been inserted?

Was it merely declaratory?

It certainly did not seem so to the people of the United States at the time of its enactment. Could they have supposed it meant so little they would scarcely have treated the matter so seriously.

Is it not the fact that the decision in those two cases was mainly owing to the reaction against the national and centralizing tendencies of the civil war and the years immediately following? Did not the Court feel that this portion at least of the Amendment did not represent the real opinion of the people? Was the appeal from the Amendment to the Court an appeal from "Philip drunk to Philip sober," and did the view of the Court better represent the calm afterthought of the people than that of the framers of the Amendment itself?

It is apparent that the Court took a different view from that of the framers of the Fourteenth Amendment as to a pure question of political science. The question was, whether civil liberty should for its sanction depend mainly upon the State or upon the Federal Government. What the framers of the instrument almost certainly intended to do was to withdraw the essentials of liberty, or what they deemed such, from possible invasion by the State Governments and to place them under the protection of the Federal Government. The Court evidently believed that such a course would have been unwise, if not positively revolutionary.

The reasoning in these cases is based upon the dictum of Justice Miller in the *Slaughter House Cases,* (16 Wall., 36).

"It would be the vainest show of learning to attempt to prove by citations of authority, that up to the adoption of the recent amendments no claim or pretense was set up that those rights depended on the Federal Government for their existence or protection, beyond the very few express limitations which the Federal

Constitution imposed upon the States—such, for instance, as the prohibition against *ex post facto* laws, bills of attainder and laws impairing the obligation of contracts. But with the exception of these and a few other restrictions, the entire domain of the privileges and immunities of citizens of the States, as above defined, lay within the constitutional and legislative power of the States, and without that of the Federal Government. Was it the purpose of the Fourteenth Amendment, by the simple declaration that no State should make or enforce any law which shall abridge the privileges and immunities of *citizens of the United States,* to transfer the security and protection of all the civil rights, which we have mentioned, from the States to the Federal Government? And where it is declared that Congress shall have the power to enforce that article, was it intended to bring within the power of Congress the entire domain of civil rights heretofore belonging exclusively to the States? * * * *The argument we admit is not always the most conclusive which is drawn from the consequences urged against the adoption of a particular construction of an instrument. But when, as in the case before us, these consequences are so serious, so far-reaching and pervading, so great a departure from the structure and spirit of our institutions; when the effect is to fetter and degrade the State Governments by subjecting them to the control of Congress in the exercise of power heretofore universally conceded to them of the most ordinary and fundamental character; when, in fact, it radically changes the whole theory of the relations of the State and Federal Governments to each other and of both these Governments to the people; the argument has a force that is irresistible in the absence of language which expresses such a purpose too clearly to admit of doubt.*

"We are convinced that no such results were intended by the Congress which proposed these amendments, nor by the legislatures of the States which ratified them." (pp. 589-590.)

The Court in *Maxwell v. Dow,* 176 U. S. 581, after quoting the above says:

"The definition of the words 'privileges and immunities,' as given by Mr. Justice Washington, was adopted in substance in *Paul v. Virginia,* 8 Wall., 168, 180, and in *Ward v. Maryland,* 12 Wall 418, 430. These rights, it is said in the *Slaughter House Cases,* have always been held to be the class of *rights which the State Governments were created to establish."* (pp. 591-592.)

Yet if they were safe in the hands of the State Governments, why did the Fourteenth Amendment prescribe that no State should abridge them?

This leaves the question in a most anomalous condition. The rights referred to then would be the rights conferred by the States generally upon their citizens. As the legislation is different in

each State, their traditions and legal systems being in so many cases entirely dissimilar, it would seem very difficult to define or enumerate these rights. Should Utah enact all the tenets of the Mormon religion into law obligatory on all, could the New Yorker sojourning in that State complain? He could not allege that he had been denied any privilege or immunity accorded to citizens of Utah?

The privilege and immunity clause of the Fourteenth Amendment as interpreted has created no new privilege-or immunities. It may, however, be claimed that what the Fourteenth Amendment really meant to do, and this is probably what the Court intended to announce, was to protect from the interference of the State all those general rights which the States had all of them accorded to the individual.

If this be the meaning of the Fourteenth Amendment as now interpreted, the Court will have to determine the rights which it considers to be fundamental, and it could only reach this result by a process somewhat analogous to that used by the Roman lawyers in determining what rules and institutions belonged to the *jus gentium.* It would be necessary to discover those rights which all the States had at all times accorded to their citizens, solely because of their citizenship. Such rights the Court apparently intends to designate when it speaks of fundamental rights. Under this view the Court is really empowered to determine what rights do and what rights do not belong to the category of fundamental rights, and in doing this they are exercising an extraordinary and almost unprecedented power.

It is obvious that all rights granted by the Constitution are protected by it. What rights not created by the Constitution are "secured" by the Constitution it is impossible to say further than we have already indicated.

"There is no intimation here that among the privileges or immunities of a citizen of the United States are the right of trial by jury in a State court for a State offense and the right to be exempt from any trial for an infamous crime, unless upon presentment by a grand jury." (*Maxwell v. Dow,* 176 U. S., 581, 594.)

Cooley, Constitutional Limitations, 4th ed., p. 497, marginal page 387, says:

"Although the precise meaning of 'privileges and immunities' is not very conclusively settled as yet, it appears to be conceded that the Constitution secures in each State to the citizens of all other States the right to remove to and carry on business therein; the

right by the usual modes to acquire and hold property, and to protect and defend the same in the law; the right to the usual remedies for the collection of debts and the enforcement of other personal rights, and the right to be exempt, in property and person, from taxes or burdens which the property or persons of citizens of the same State are not subject to."

It would seem that had the intention of the framers of the Fourteenth Amendment been carried out by the Court there would have been no such difficulty in discovering the "precise meaning of privileges and immunities."

The privileges and immunities of citizens of the United States should not be matters so difficult or "tedious" to define. The view that this phrase included the liberties enumerated in the Bill of Rights and that the Fourteenth Amendment intended to secure these great historic rights against all government, both State and National, would have left little ground for doubt or difficulty.

Such rights in addition to those already secured against State action in the First Article of the Constitution would have made a formidable array of rights and immunities which every American citizen would have been sure that he possessed, whereas under the present interpretation of the Amendment it is impossible for him to know exactly what his rights are.

In both the Hurtado and Maxwell cases masterly dissenting opinions were written by Mr. Justice Harlan. These opinions are among the best written by that learned and experienced jurist. They make it clear that the decisions mentioned have repealed much of the Fourteenth Amendment.

Thus the State is as free to-day as it was when the Permoli case was decided, to establish a religion. If the State of Utah chooses to make Mormonism the established religion, there is nothing in the Fourteenth Amendment to prevent it, as Mr. Jusice Harlan has pertinently observed. (*Maxwell v. Dow,* 176 U. S., 581.)

Recent cases make it clear that the States are as free from trammel by the Bill of Rights to-day as they were before the Amendment.

"The provision in reference to cruel and unusual punishments was taken from the well-known act of Parliament of 1688, entitled 'An Act Declaring the Rights and Liberties of the Subject and Settling the Succession of the Crown,' in which, after rehearsing various grounds of grievance, and among others, that 'excessive bail hath been required of persons committed in criminal cases, to elude the benefit of the laws made for the liberty of the subjects; and excessive fines have been imposed; and illegal and cruel pun-

ishments inflicted.' * * * Stat. 1 W. & M. c. 2. This Declaration of Rights had reference to the acts of the executive and judicial departments of the government of England; but the language in question as used in the constitution of the State of New York was intended particularly to operate upon the legislature of the State, to whose control the punishment of crime was almost wholly confided. So that, if the punishment prescribed for an offense against the laws of the State were manifestly cruel and unusual, as burning at the stake, crucifixion, breaking on the wheel, or the like, it would be the duty of the courts to adjudge such penalties to be within the constitutional prohibition. *And we think this equally true of the Eighth Amendment, in its application to Congress.*" (*In re Kemler,* 136 U. S., 436, at pp. 446, 447.)

The Court held in this case upon the authority of the *United States v. Cruikshank,* 92 U. S. 542; the *Slaughter House Cases,* 16 Wall. 36, and *Hurtado v. California,* 110 U. S. 516, that the Fourteenth Amendment did not affect the case nor make the eighth section of the Bill of Rights applicable to State action. The Court, through Mr. Chief Justice Fuller, there said:

"Undoubtedly the amendment forbids any arbitrary deprivation of life, liberty or property, and secures equal protection to all under like circumstances in the enjoyment of their rights; and, in the administration of criminal justice, requires that no different or higher punishment shall be imposed upon one than is imposed upon all for like offences. But it was not designed to interfere with the power of the State to protect the lives, liberties and property of its citizens, and to promote their health, peace, morals, education and good order." *Barbier v. Connolly,* 113 U. S., 27, 31, pp. 448-9.

In the case of *Presser v. Illinois,* 116 U. S., 252, the question was as to the applicability of the Second Amendment of the Constitution to a State law providing that none but members of the State militia should be allowed to bear arms, etc. The Court there said:

"But a conclusive answer to the contention that this amendment prohibits the legislation in question lies in the fact that the amendment *is a limitation only upon the power of Congress and the National Government, and not upon that of the States.* * * * The Second Amendment declares that it shall not be infringed, but this, as has been seen, means no more than that it shall not be infringed by Congress. This is one of the amendments that has no other effect than to restrict the powers of the National Government, leaving the people to look for their protection against any violation by their fellow citizens of the rights it recognizes to what is called in *The City of New York v. Miln,* 11 Pet. (102) 139, the 'powers which relate to merely municipal legislation, or what was perhaps more properly called internal police,' 'not surrendered or restrained'

by the Constitution of the United States. See also *Barron v. Baltimore,* 7 Pet. 243; *Fox v. The State of Ohio,* 5 How. 410; *Twitchell v. Commonwealth,* 7 Wall. 321, 327; *Jackson v. Wood,* 2 Cowen, 819; *Commonwealth v. Purchase,* 2 Pick. 521; *United States v. Cruikshank,* 1 Woods, 308; *North Carolina v. Newsom,* 5 Iredell, 250; *Andrews v. State,* 3 Heiskell, 165; *Fife v. State,* 31 Ark. 455." (p. 265.)

How is it to be determined what rights are fundamental and what are not if the Constitution has not determined it? They must be questions to be determined by the Court, and this substitutes the judgment of the Court in each particular case, for the precise and clear language of the Constitution.

It seems to us that there is no escape from this inference; it is the only theory upon which the decision in *Maxwell v. Dow* can be explained.

This was clearly the view that Mr. Justice Harlan took of the prevailing opinion, for he says:

"When our more immediate ancestors removed to America, they brought this privilege with them, as their birthright and inheritance, as a part of that admirable common law which had fenced round and interposed barriers on every side against the approaches of arbitrary power. It is now incorporated into all our State constitutions *as a fundamental right,* and the Constitution of the United States would have been justly obnoxious to the most conclusive objection if it had not recognized and confirmed it in the most solemn terms." (p. 610.)

The scope of the decision and its far reaching effect was clearly seen by Mr. Justice Harlan:

"Suppose the State of Utah should amend its constitution and make the Mormon religion the established religion of the State, to be supported by taxation on all the people of Utah. Could its right to do so, as far as the Constitution of the United States is concerned, be gainsayed under the principles of the opinion just delivered? If such an amendment were alleged to be invalid under the National Constitution, could not the opinion herein be cited as showing that the right to the free exercise of religion was not a privilege of a 'citizen of the United States' within the meaning of the Fourteenth Amendment? * * * There is no middle position, unless it be assumed to be one of the functions of the judiciary by an interpretation of the Constitution to mitigate or defeat what its members may deem the erroneous or unwise action of the people in adopting the Fourteenth Amendment. * * * The right to be tried when charged with crime, by a jury of twelve persons, is placed by the Constitution upon the same basis as the other rights specified in the first ten amendments. And while those

amendments originally limited only the powers of the National Government in respect of the privileges and immunities specified therein, since the adoption of the Fourteenth Amendment those privileges and immunities are, in my opinion, also guarded against infringement by the States. * * *

"If some of the guarantees of life, liberty and property, which at the time of the adoption of the National Constitution were regarded as fundamental and as absolutely essential to the enjoyment of freedom, have, in the judgment of some, ceased to be of practical value, it is for the people of the United States so to declare by an amendment of that instrument. But, if I do not wholly misapprehend the scope and legal effect of the present decision, the Constitution of the United States does not stand in the way of any State striking down guarantees of life and liberty that English speaking people have for centuries regarded as vital to personal security, and which the men of the Revolutionary period universally claimed as the birthright of freedom." (pp. 616-617.)

This reasoning seems to be quite unanswerable. It emphasizes the fact that under that fiction of interpretation the Court has actually changed the Constitution.

In the Hurtado and Maxwell cases the Court had already indicated a belief that there were certain fundamental rights belonging to United States citizens, which rights were not necessarily contained among the rights guaranteed to the individual by the Constitution.

The Court in the Insular Cases clearly expressed the existence of this distinction, based upon the nature of right itself. The decision there did not turn on the question, so that the expression quoted is a dictum.

Mr. Justice Brown, (*Downes v. Bidwell,* 182 U. S. 244), uses the following significant language:

"There are certain principles of natural justice inherent in the Anglo-Saxon character which need no expression in constitutions or statutes to give them effect or to secure dependencies against legislation manifestly hostile to their real interests." (p. 280.)

"We suggest, without intending to decide, that there may be a distinction between certain natural rights, enforced in the Constitution by prohibitions against interference with them, and what may be termed artificial or remedial rights, which are peculiar to our own system of jurisprudence. Of the former class are the rights to one's own religious opinions and to a public expression of them or, as sometimes said, to worship God according to the dictates of one's own conscience; the right to personal liberty and individual property; to freedom of speech and of the press; to free access to courts of justice, to due process of law and to equal protection of the laws; to immunities from unreasonable searches and seizures,

as well as cruel and unusual punishments; and to such other immunities as are indispensable to a free government. Of the latter class are the rights to citizenship, to suffrage (*Minor v. Happersett,* 21 Wall. 162), and to the particular methods of procedure pointed out in the Constitution, which are peculiar to Anglo-Saxon jurisprudence, and some of which have already been held by the States to be unnecessary to the proper protection of individuals." (pp. 282, 283.)

Before commenting upon this passage as a whole, it may be remarked that the particular methods of procedure which have been held unnecessary to the proper protection of the individuals, are not the only rights secured against the federal government but not against the States.

All of the rights which Mr. Justice Brown has spoken of as "natural rights," the Court, as we have shown, hold the States may under the Constitution disregard, and their reasoning has not been based upon the distinction in the nature of the rights themselves, although incidental remarks may be found to that effect.

This passage when analyzed must be based upon one of two alternative theories:

(1) Either the natural rights spoken of by the learned Justice exist of themselves and wholly apart from the Constitution, deriving their sanction from a supposed law of nature and not from that instrument.

(2) Or the language of the Constitution itself protecting those rights is so broad and imperative as to be of universal application to government action in the specific cases.

If the former be the proper interpretation of this interesting passage, the questions which would arise in regard to it would not present problems of constitutional law at all, but questions of abstract philosophy. If there are certain rights which are protected because they are assumed to belong to the category of "natural rights," the question in each case would be as to whether such rights were "natural" or not. If they were they would be protected because of their inherent character, and if they were not, they would either have to rely upon positive man-made law for their sanction, or else be unprotected by any law.

In order, therefore, to ascertain what rights were natural and, therefore, entitled to immunity from attack by all organs of the government, we would have to refer not to the law books, which deal only with positive law, but to treatises on philosophy from Aris-

totles' Politics (250 B. C.) down to Ritchie's "Natural Rights" (1890 A. D.), with especial reference to Rousseau.

As almost every writer upon the subject has differed as to what natural rights are, following in his views, the general ideals of the particular time in which he happened to live, we must respectfully submit that any appeal to natural rights at this day must prove utterly futile.

Nor do we at all believe that the learned Justice meant that certain rights were to be protected independently of constitutional and positive law simply because they were "natural." We incline to think the true meaning of the passage to be that the positive prohibitions against all action upon the part of Congress in certain cases were intended for the protection of what were deemed natural rights, and that consequently some at least of that vague body of philosophic doctrine has been transplanted into the domain of positive law and given the dignity of constitutional adoption by being placed in the first eight amendments to the Constitution. Therefore, we submit, Mr. Justice Brown must refer to the same rights which he mentions in the following passage:

"To sustain the judgment in the case under consideration, it by no means becomes necessary to show that none of the articles of the Constitution apply to the island of Porto Rico. There is a clear distinction between *such prohibitions as go to the very root of the power of Congress to act at all,* irrespective of time or place, and such as are operative only throughout the United States or among the several States." (*Downes Case,* pp. 276-277.)

This seems likewise to be the thought of Mr. Justice White in the same case, for he says in the following passage:

"Undoubtedly there are general prohibitions in the Constitution in favor of the liberty and property of the citizen which are not mere regulations *as to the form and manner in which a conceded power may be exercised, but which are an absolute denial of all authority under any circumstances or conditions to do particular acts.*" (*Downes Case,* 182 U. S., p. 294.)

The distinction suggested is founded not upon a difference in the nature of the rights themselves, that is to say, as to whether they are natural or artificial, but upon the language of the prohibitions directed against the action of Congress.

This being established, let us examine this distinction with a view of ascertaining its soundness, and whether any line of demarcation can be drawn between the absolute withdrawals of power from Congress and "the form and manner in which a conceded

power may be exercised." If such a distinction be sound it would be possible to relegate the Fifth, Sixth and Seventh Amendments to an inferior category.

Mr. Justice Brown speaks of the right to due process of law and to immunity from unreasonable searches and seizures, as well as from cruel and unusual punishments, coupling them with freedom of conscience, freedom of the press, etc., as "natural rights." Congress has the power to take property, to institute searches, to make seizures and to execute punishments. It is evident, therefore, that in no one of these instances does the prohibition go to the root of the power of Congress to perform the acts in question. It may authorize all these things, but when the government takes property it must do so by due process of law; when it institutes searches, they must be reasonable (that is to say, according to the canons of the common law), and when it visits punishments, they must be neither cruel nor unusual, as those words are understood in the light of English and American common law and civilization.

It thus appears that in the seven illustrations given by the learned Justice of rights with which Congress may in no event interfere, three are protected by the prohibitions which do not "go to the root of the power of Congress" at all. Nor is it possible to claim that the instances mentioned belong to the shadowy domain of natural or fundamental rights rather than to the more strictly defined and easily ascertainable category of common law rights. The Fifth Amendment contains a number of prohibitions directed against the action of Congress, all of which are admittedly based upon so-called common law rights rather than upon more general rights or rights not so wholly identified with the development and history of the English law.

If, therefore, for either of the reasons suggested there exist a distinction in the Constitution between the prohibitions in favor of natural rights and those in favor of artificial rights, consistency necessarily dictates that all these rights be placed in the same category. Taking, therefore, these rights *seriatim* it must be admitted that if the language:

1. "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of the grand jury,"

is not always binding on Congress, then it must also be admitted that Congress can also disregard the prohibitions.

2. "Any person (in such territory may) be subject for the same offence, to be twice put in jeopardy of life or limb,"
or may be
3. "compelled in any criminal case to be a witness against himself,"
or may
4. "be deprived of life, liberty or property *without due process of law,*"
and private property may be
5. "taken for public use without just compensation."

The Sixth Amendment, like the Fifth, is devoted to consecrating the peculiar forms and procedure long deemed necessary to the maintenance of English liberty, and if jury trial belongs to the category of the artificial or remedial rights these rights likewise belong to the same category, and the court must admit that Congress without violation of the Constitution, might deprive persons in criminal prosecutions from enjoying

(1) "the right to a speedy and public trial";
(2) "to be informed of the nature and cause of the accusation,
(3) to be confronted with the witnesses against him,
(4) to have compulsory process for obtaining witnesses in his favor,
(5) and to have assistance of counsel for his defense."

Not one of these rights was protected against the action of the government in the Roman law countries at the time of the adoption of the Constitution, and they are clearly common law rights in their genesis and development. They were totally opposed to the inquisitorial system of the civil law. They are thus exactly in the same category with the right to be tried only upon presentment by a grand jury and to be convicted only upon a unanimous verdict of a petit jury. No *refinement of philosophy can segregate the rights contained in these two amendments into different classes.*

If in the lapse of time some of the rights guaranteed by the Constitution may be deemed of less importance than formerly, it may be that the people should be called upon in the regular constitutional way to amend that instrument. The framers believed jury trial to be an essential element of liberty. Probably many of our people no longer take that view. Should the change in public sentiment, if such there be, be sufficient reason to induce this Court to make a decision which will, for the first time, be authority for the proposition that law courts, acting under United States authority,

may in our own domestic territory, without acting "contrary to the Constitution," violate every right which English speaking men have considered vital since the barons humbled King John at Runnymeade?

This language of Mr. Justice Brown as to natural rights was used as a foundation upon which to decide the *Mankichi Case,* 190 U. S. 197, and that which was a mere dictum in the Downes case has now become part of our constitutional law by reason of that decision.

In the Mankichi case, Congress in annexing Hawaii, declared that:

"The municipal legislation of the Hawaiian Islands, not enacted for the fulfillment of the treaties so extinguished, and not inconsistent with this joint resolution *nor contrary to the Constitution of the United States,* nor to any existing treaty of the United States, shall remain in force until the Congress of the United States shall otherwise determine." (190 U. S., p. 209.)

Under the law as it stood at the time of the annexation of the Hawaiian Islands, criminal prosecutions were carried on by informations and trials before a jury which could convict by a three-fourths vote. The defendant, Mankichi, was so tried and convicted of manslaughter. He sued out a writ of *habeas corpus,* which was sustained, and the Attorney-General of the islands took an appeal to the Supreme Court of the United States.

The case did not involve the question argued in the Insular cases as to whether the Constitution was of itself applicable to the outlying possessions of the United States. The sole question was as to whether, when Congress enacted that only laws not "contrary to the Constitution" should be in force in Hawaii, the Fifth and Sixth Amendments did not become as applicable there as elsewhere throughout the United States. These very amendments had been held applicable to criminal prosecutions in the other territories of the United States. (*American Pub. Co. v. Fisher,* 166 U. S. 464; *Thompson v. Utah,* 170 U. S. 343, and other cases.) It was urged that unless they were, this phrase of the Act of Congress was absolutely meaningless, and had the laws of Hawaii established religious tests for the holding of office, burning as a customary punishment, and general search warrants as a part of their procedure, such would not have been any more obnoxious to the constitutional objection than denial of jury trial as prescribed by the Fifth and Sixth Amendments.

The government, on the other hand, relying upon the dictum of Mr. Justice Brown, above adverted to, refused to assent to this conclusion, but claimed that there was a certain line of cleavage

between the various prohibitions contained in the Bill of Rights in that some of the rights were fundamental or natural, while others only related to methods of procedure and hence could be dispensed with by the government.

The question was thus squarely presented to the Court as to whether it had power to distinguish between equally positive prohibitions in the Constitution on the ground that some belonged to the domain of natural rights, while others did not. This would make the criterion of the rights of citizens or other persons in the United States dependent upon the Court's view as to what constituted natural rights rather than upon the positive mandate of the Constitution.

In principle this view was irreconcilable with the decision in *Ex parte Bain,* 121 U. S. 1.

The Court answers the question, first, by saying that a literal interpretation of the statute would make applicable to existing Hawaiian law the prohibitions contained in the two Amendments mentioned, but that no such literal interpretation should be given the statute, as it should be assumed that Congress did not mean to disturb the existing criminal legislation in the islands. Therefore, the trial as held, was decided not to have controvened the Constitution, but the Court said, in answer to the argument of counsel, that their decision in favor of the government would necessarily be to render the words "contrary to the Constitution" mere empty verbiage:

"It is not intended here to decide that the words 'nor contrary to the Constitution of the United States' are meaningless. Clearly they would be operative upon any municipal legislation thereafter adopted, and upon any proceedings thereafter had, *when* the application of the Constitution would not result in the destruction of existing provisions conducive to the peace and good order of the community. Therefore we should answer without hesitation in the negative the question put by counsel for the petitioner in their brief: 'Would municipal statutes of Hawaii, allowing a conviction of treason on circumstantial evidence, or on the testimony of one witness, depriving a person of liberty by the will of the legislature and without process, or confiscating private property for public use without compensation, remain in force after an annexation of the Territory of the United States, which was conditioned upon the extinction of all legislation contrary to the Constitution?' We would even go farther and say that most, if not all, the privileges and immunities contained in the bill of rights of the Constitution were intended to apply from the moment of annexation; *but we place our decision of this case upon the ground that the two rights alleged to be violated in this case are not fundamental in their nature, but*

concern merely a method of procedure which sixty years of practice had shown to be suited to the conditions of the islands, and well calculated to conserve the rights of their citizens to their lives, their property and their well-being."

This, then, is the last step in the evolution of the decisions of our highest tribunal on this point as to jury trial. It serves to illustrate the fact that the Court, in interpreting the Constitution, may, and does, positively amend or change it. Other examples of this process might indeed be given, but we doubt if there are any which stand out so unequivocally as the one we have just been considering.

What we have said has not been intended in any way as criticism, or as the slightest reflection upon the judicial knowledge, acumen and intellectual integrity of that great tribunal. In deciding as they have done it may well be that they have acted wisely and for the best interests of the nation. It is, however, necessary that we lawyers should appreciate exactly what is taking place in the domain of constitutional law; by comprehending the nature of the process and its results we are in a position to criticise intelligently at least, and criticism where lawyers are concerned is a law of life.

It is usual in closing a discourse of this kind to indulge in some attempt at peroration, parading a few glittering phrases and pompous truisms, perhaps stimulating the feelings, serious or otherwise, of one's auditors. I fear that I have neither the ability nor the inclination to do this, but must content myself with trying to sum up in a word the idea, if it be worthy of that name, that I have been striving to propound and illustrate.

It is briefly this: As a people we have shown political ability and sagacity of a high order. Man is naturally a political animal, although he is many other things besides, and the English speaking political animal seems to have been the most practical so far seen. While others have certainly surpassed him in different departments of human activity, such as art, literature and philosophy, they have rarely or never been able to combine in the same degree stability and progress in matters of government.

The fact that we have a written Constitution is an accident of our history. But we have developed and changed it no less radically and, perhaps, more so than the English have done their unwritten customary Constitution. This result has been reached wholly through the medium of judicial decision, save in the case of the three amendments following our civil war and designed to perpetuate its results.

But these judge-made changes have usually been in accord with and due to the spirit of the age; the Court really doing little more than registering the modifications of the national common consciousness. Hence, these changes in most cases have passed unnoticed.

Where, however, the Supreme Court has endeavored to counteract, if not absolutely to stem a great current of public feeling, as it did in the Dred Scott case, the decision has only deepened and invenomed the conflict which it tried and hoped to avert. When Mr. Buchanan announced that the expected decision of the Court in that famous case would solve the slavery question forever, he did not appreciate the fact that the prestige and power of the Court as of all other branches of the government, must ultimately rest upon its harmony with the general settled trend of public opinion.

The respect heretofore shown by our people for the Constitution, and the almost veneration with which they have regarded it, is in itself a sentiment that must be fostered and preserved, as the utility of the Constitution and its endurance must depend upon the existence of such a feeling. Destroy that conservative sentiment and the Constitution itself would be of little value.

The Constitutions of South American republics are no guaranty of stability, not because of any defect in language or symmetry, but because the institutions they attempt to create do not command the reverence and respect of the nation. A Constitution, like a suit of clothes, must be made with some reference to the wearer. If he live under the tropical sun his apparel, constitutional and otherwise, must not be over elaborate.

It seems to me that the danger in America in our day comes more largely from the constantly growing and all invading activity of government than from any other source. While the Supreme Court cannot, of course, remain oblivious of or be uninfluenced by this tremendous drift of opinion, it should be careful not to hasten it or go in advance of it. Timely restraint may cause the reconsideration of various half-understood policies and keep our government in the line of evolution rather than in that of revolution.

Some of our old institutions may have become obsolete, but they cost many years of effort and much shedding of blood to attain, and they should not be surrendered without careful reflection. If the constitutional method of amendment is too difficult the extra-constitutional method, useful though it has been and will still be, must not become too easy. If it does the foundation of our govern-

ment,—respect for our constitution—will be sapped. It is said, and perhaps truly, that past generations should not control the actions of the present. But before we definitely conclude that our wisdom is so much greater than that of our forefathers, let us be quite sure that we are right. Above all, let not the Bar delude itself with fictions and official theories which only "blink the facts." Fearless analysis, not lazy acquiescence or unreasoning vituperation, were never more needed and seldom less practiced. The Bar cannot act intelligently unless it first thinks clearly.

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